Supreme Court of the United States

OCTOBER TERM, 1943, NUMBER 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Counsel for Appellant.

PAXTON & SEASONGOOD,
SCRIBNER & MILLER,
Of Counsel.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

TABLE OF CASES

STATUTES

Supreme Court of the United States

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

STATEMENT

The Opinion and Entry Below

As mentioned in the jurisdictional statement (R. 138, 141),* the court rendered no written opinion when refusing appellant leave to intervene. Accordingly, in the absence of formal opinion, a narrative of what took place and of the court's rulings is submitted as a substitute. The application to intervene was made and a proposed order allowing intervention was presented (R. 90) at the opening of court (R. 43). The "Statement on Behalf of Appellee, The National Cash Register Company, Opposing Jurisdiction" (R. 151, 163 bot.) admits that the service of the papers "was within a half hour of the opening of court on No-

* Record references are to the typewritten transcript filed in this Court.

vember 15, 1943." The transcript (R. 43, 44) shows the following:

> "The Court: What is the name of your client?
>
> "Mr. Seasongood: Allen Calculators, Incorporated; and we have, your Honor, answer and application to intervene which we would like to file. We have given copies to both the Cash Register and the Government.
>
> "Mr. Graydon: We very strongly object. This is a suit between the United States and the National Cash Register Company. We have just seen this answer. There isn't anything that the United States can't raise and isn't prepared to raise, but we don't see where this company has any standing as a party to this suit.
>
> "Mr. Meyers: Your Honor, the Government has no objection to the Allen Calculators Company's application to intervene in this, because we feel that the federal rule is specifically Rule 24(b)(2), which supports an application to intervene at this time.
>
> "The Court: It is at least accepted conditionally at this time, to save time.
>
> "Mr. Graydon: All right.
>
> "Mr. Seasongood: We have an order permitting it to be filed.
>
> "The Court: Conditionally filed at this time.
>
> "Mr. Graydon: Note objection and exception of The National Cash Register Company."

After opening statements had been made on behalf of The National Cash Register Company (which will be referred to as "National") and on behalf of the Government, appellant's counsel was also permitted to make an opening statement on behalf of his client which the court had "conditionally or tentatively allowed to intervene" (R. 45) and was permitted to state somewhat the reasons for intervention. The court said (R. 48-49):

> "Just a thought, you know. There are occasions when you have a right to intervene and file a brief, but here is a proceeding between two private parties

and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position. Do you have any objection to the case proceeding today between the Government and The National Cash Register Company and you just sit by and then——

"Mr. Seasongood: ——I think this, your Honor—of course, we want to cross-examine, have the opportunity to cross-examine.

"The Court: I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities——

"Mr. Seasongood: ——Of course, we will supply the authorities, but that is true of any intervention. Intervention is always where somebody who is not a party to the original suit asks to come in and is permitted to come in because he has a special interest. We think we have a special interest, and it does seem to me that where the Government, who is the moving party, has no objection, that the person who is proceeded against is not the one to say whether they should be permitted to intervene if the Government has no objection, and they said they didn't."

The transcript further shows (R. 49) one of the Government counsel, Mr. Meyers, then asked if the court would hear him and, upon the request being granted, said (R. 49):

"Mr. Meyers: Your Honor, I merely wanted to comment on the application for intervention, if you will hear me on it.

"The Court: All right. It seems to me this is unusual.

"Mr. Meyers: I think the unusual character of this application is due to the fact that this is a decree matter and not a case of first impression. However, under

the rules of civil procedure it seems clear to me that the application should be granted where the applicant for intervention has a claim or defense in common, providing that certain procedural aspects of the application are taken care of, such as time, and that the intervention will not unduly prejudice or delay the rights of the parties involved. I think the application in this case meets the two conditions. It think it meets the substantive condition. That is, the applicant having a claim or defense in common with that of the Government, I think it is to the interest of the applicant that he preserve whatever rights he may have in this litigation because of two situations: (1) There is a matter of private litigation going on between Allen-Wales and Allen Calculators. In that the Government has no interest, but I can see the applicant would like to preserve whatever rights he has in that litigation in this action. (2) He has a claim, in my judgment, in common with the Government, to see that the retail level of distribution is not wiped out, diminished, by the petitioner in this cause, because such elimination of competition at the retail level, in the Government's opinion, would eliminate competition on the manufacturing level. That is the last vestige of competition that is remaining among independent manufacturers. So we do believe that the applicant here has a meritorious application to present to the Court, if the Court wants it.

"The Court: Does the Government concede that Allen-Wales is one of nine manufacturers manufacturing the same type of machine and, assuming that eventually, if the deal went through, it would be approved by the upper courts, wouldn't there be eight doing the same line of business?

"Mr. Meyers: I would like to defer to my associate on that. He has the figures.

"The Court: I just want to know whether that is the fact.

"Mr. Seasongood: We deny that.

"The Court: That is all I want to know."

Then, counsel for National asked leave to hand up a stipulation for filing with the approval of the Government. Counsel for appellant stated he would like to see it (R. 50 bot.) and suggested that the rights of appellant should be "preserved as to everything that is offered that they have stipulated."

"The Court: Without opening your mouth you have an exception to everything that takes place here" (R. 51).

"The stipulation so offered is made part of this record, marked PETITIONER'S EXHIBIT No. 1.

"Mr. Seasongood: Your Honor, may I make just one more suggestion as to our right to intervene?

"Mr. Graydon: I don't think we want to hear this.

"Mr. Seasongood: I think this would convince the Court—at least, I hope it would.

"The Court: Is it going to take just a minute?

"Mr. Seasongood: Just a minute, your Honor. Section 16 of the Clayton Act expressly authorizes any corporation to have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. If we would sue to enjoin this going through, the United States would have to intervene and we would have this all over again in another litigation, and it seems to me that makes it clear we have the right to intervene.

"Mr. Graydon: That may be clear, but the question is, who is running this case? Is this the Government's case or your case?

"Mr. Seasongood: Any intervention has to be in subordination to the main person.

"Mr. Graydon: If you think it is sufficiently subordinated, that is all right.

"The Court: This is a proceeding to permit the purchase of this company by modification of the decree of this Court. We must not lose sight of that. I think later along we can consider the matter of intervention. . . ." (R. 51-52.)

When a chart purporting to show sales of adding machines in 1941 was offered (R. 52), the following occurred (R. 52 bot. 53):

> "Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machines were $31,822,000.
>
> "Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.
>
> "The Court: It is correct?
>
> "Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.
>
> "Mr. Graydon: Do you want to correct it?
>
> "Mr. Seasongood: Sure. I want to come in to see that it is corrected."

A recess until afternoon was then taken.

Counsel for the Government (R. 56) asked if appellant's status would permit them to put their Mr. Allen on and asked (R. 57):

> "Mr. Moyer: What is the status of the intervenor at this time?
>
> "The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between those parties. I think it would be unreasonable at this time to——
>
> "Mr. Moyer: ——I will call Mr. Allen. . . .
>
> "Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.
>
> "The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an

exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

"Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case."

At the opening of the session on November 16, 1943, appellant presented an entry which was satisfactory to the Government (R. 58), showing the court overruled the motion to intervene

"upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company."

Counsel for National objected to such entry and then suggested various supposed grounds upon which the application to intervene might have been denied. The controversy relating to the entry is set out at R. 58-62.

It appears from the foregoing that, at the time the application to intervene was made, the Government considered it timely and appropriate and no objection was made by National except that, as this was a suit between the United States and National and there was nothing the United States could not raise and was not prepared to raise, appellant had no standing as a party to the suit; that the court allowed tentative intervention and was to afford opportunity for the presenting of authorities at the end of the day, but later in the same day, without having afforded opportunity for submission of authorities, refused intervention for the reason advanced by counsel for National. As was stated by counsel for appellant to the court (R. 59), if a suggestion of untimeliness had been

made by National when the application to intervene was presented, the suggestion could and would have been refuted; but none such was made. The only objection was that appellant had no status that permitted it to intervene. That was the ground and the sole ground on which the court refused intervention.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

This appears in the jurisdictional statement (R. 138) filed December 4, 1943, and in the supplemental jurisdictional statement filed December 10, 1943 (R. 149). 15 U. S. C., Sec. 29, referred to in the former, reads:

> "In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. . . ."

Section 16 of the Clayton Act reads:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue. . . . Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737."

Concise Statement of the Case

Appellant had a special interest, individually and as representative of the class of independent dealers, in seeking to resist the relief sought by National.

The proposed answer of appellant (R. 78, 79-80) in paragraphs 3 and 4 shows that the basic principles underlying the cash register, the adding machine and other articles are substantially the same and that the manufacturing facilities and personnel of National are adequate to manufacture adding machines. It shows, paragraph 5 (R. 80, bot. 81), that National purposes withdrawing the Allen-Wales manufacturing plant from Ithaca, New York, and integrating it into its own plant in Dayton, thereby disturbing the relationship of some four hundred employees in the Ithaca plant, etc. (Nothing relating to that appears in the Government's answer, R. 18-21.)

Paragraph 11 (R. 83) of the answer shows that

> "the so-called adding machine-cash drawer combination units have mounted to a total in excess of 12,000 per annum"—

business not secured by National, but if there is a purchase of Allen-Wales it would make National

> "a formidable competitor against all independents, who will have reason to fear their competition."

Paragraph 12 shows that after the decree of February, 1916, Remington, a formidable competitor in the cash register field, had, after bitter competition, to sell out to National.

Paragraph 15 (R. 84-5) shows the method of doing business of the independent dealers.

Paragraph 20 (R. 87) shows the particular hardship which would result to appellant from permitting National to market under the Allen-Wales name, because of the name

"Allen" and resulting confusion. It is also noted there that Mr. Allen "claims an interest in the Allen-Wales company through litigation which is now pending."

Paragraph 22 contains certain direct denials of allegations in the petition not clearly denied in the Government's answer (R. 18-21).

Not alone did the proposed answer show special interest and reasons for permitting appellant to intervene, but the so-called opening statement made on its behalf (R. 45) and the reference to Section 16 of the Clayton Act (R. 51) also showed grounds for permitting intervention. Attention of the court was attracted to that portion of Second (p) of the decree which enjoined National from acquiring stock ownership of

> "any competitor engaged in the manufacture or sale of cash registers or other registering devices. . . ."

and that Allen-Wales was such. It was further contended Allen Calculators manufactures a cash register and is in direct competition with National; National might refer to it as a cash drawer or something else but that, in fact, it was a "cash register or other registering device." The pertinency of a finding of guilt, even by consent (R. 46), would have been elaborated with authorities of this court had appellant been permitted, as it was not, to develop this aspect of the case. So, of the point that as the National already has bookkeeping or accounting machines, they would not need this purchase "to supplement the plant." It was stated also that the method of doing business of competitors, Allen Calculators and other independents would be developed and that appellant would be affected by the decree (R. 47) and had a special aptitude for presenting the position of the independent dealer; also that its application to intervene was in subordination to the Government position and that somewhat similar interven-

tion had been allowed in other cases. The right of appellant to intervene under Section 16 of the Clayton Act was also impressed upon the court (R. 51-2).

It is true that the answer of the Government ends with a request that the petition be denied (R. 21), but counsel for the Government, in his closing argument, said (R. 64):

> "And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation."

The Government had sent out a form letter or questionnaire (R. 70-71) to a number of Allen-Wales distributors and had received answers from twenty-two, of which three sample copies from Bakersfield, California (R. 72), Charlotte, North Carolina (R. 73), and Boston, Massachusetts (R. 74-75), appear in the transcript.

The stipulation (R. 66-69) handed to the court on the afternoon of November 15, 1943 (R. 53), provides (R. 68):

> "IV. The Attorney General has written a form letter to certain of the present dealers and distributors of Allen-Wales adding machines and has received letters from some of them in reply. A copy of the said letter written by the Attorney General, and the replies

> received thereto, may be presented to the Court at the hearing for its inspection. No objection thereto will be made by the petitioner on the ground of hearsay or incompetency; but the petitioner reserves the right to object to the same on the ground of irrelevancy and immateriality, and to comment on the value of such letters as evidence because of lack of opportunity for cross-examination, and in so far as they may contain expressions of opinion. The same shall apply to any letters written by the petitioner or by the Allen-Wales Adding Machine Corporation to Allen-Wales dealers and distributors and to any replies received thereto."

The questionnaire and replies received from twenty-two dealers were offered under the stipulation "for the inspection of the court," Government counsel saying:

> "The stipulation provides that this is offered for inspection by the court and also that National's counsel can offer any comments on the communications that they desire to."

The transcript shows (R. 53-4) that thereupon the whole matter before the court was narrowed, actually or tacitly, by the parties to the question whether the proposed purchase would substantially lessen competition, and the argument and proof that appellant would have adduced, as outlined in its opening statement, including that any permitted purchase must supplement the plant, was not treated as an issue. The court said (R. 55 bot. 56):

> "Well, I question the propriety of the letters, and your position is not under oath, and I say I will receive it conditionally, just to enable you to make up the record, so if the Court of Appeals wants to have anything to do with it, it will be before them. . . .
>
> "Mr. Moyer: This is covered by the stipulation. Under existing conditions we did not want to subpoena in forty or fifty dealers. The statements are before the Court under the stipulation, and any comment National wishes to make on them——

"The Court: ——For practical purposes let us let them in.

"The folder referred to, containing photostatic copies of statements by dealers of Allen-Wales Adding Machine Corporation, is made part of this record as GOVERNMENT'S EXHIBIT NO. 105.

"Mr. Garver: This memorandum, which is prepared by Allen-Wales Company, which we would like to submit with the letters, contains a list of all of their sales dealers and distributors. It gives the date when each started in business, it gives the date when they made a contract with Allen-Wales, and it contains information from their own letterheads and from Dun and Bradstreet as to what business they are in.

"The Court: Let the Government put theirs in.

"Mr. Moyer: We are also offering communications received from each of the manufacturers of adding machines, giving an outline of the distribution systems.

"The folder referred to, marked 'Adding Machine Distribution Systems,' is made part of this record as GOVERNMENT'S EXHIBIT NO. 106."

Specification of Assigned Errors Intended to Be Urged

All of the three assignments of error (R. 31) are intended to be urged, namely, (1) overruling motion for leave to intervene, (2) withdrawing leave to intervene conditionally, (3) failing to enter order in conformity with decision in refusing leave to intervene.

SUMMARY OF ARGUMENT

In opposition to a motion to dismiss or affirm, a showing of probable jurisdiction and that the questions presented by the appeal are substantial is enough. The appeal involves the right of a private concern, specially affected, to intervene, with the Government's consent, in support of the Government's opposition to the modification of a consent injunction in an anti-trust suit.

The decree of February, 1916, sought by National to be modified was entered against it following convictions of its officers and agents in a criminal proceeding for violation of the anti-trust laws, which was reversed with directions to award a new trial. *Patterson* v. *United States*, 222 Fed. 599 (C. C. A. 6, 1915), pp. 633, 634, 637, 639, 643, 650. It was there charged that National (pp. 611t, 623, 625) did from 80 to 95 per cent of the manufacturing and selling of cash registers. The proposed answer of appellant (R. 78, 80 bot., par. 5, 83, par. 12) set up that National still exercises predominant control in its field. This opinion in the criminal case refers to evidence of the most flagrant character of illegal acts utilized for the ruthless suppression of competition. The final decree sought to be modified enjoins a great number of such acts. Second (p) (R. 5) enjoins National from acquiring ownership or control by means of stock ownership of the whole or an essential part of the business of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides in case any such acquisition is desired a petition may be presented to the court, which the court may allow. The paragraph Third (R. 5) of the decree is a usual one in anti-trust injunction cases. It retains jurisdiction of the cause for the purpose of enforcing the decree and of enabling the parties to apply to the court for modification.

By this decree, the court assumed control of the stock of all competing corporations so far as might concern acquisition of stock of any of them by National and, in effect, placed the "disposition of property in the custody of the court" within the meaning of Rule 24(a)(3) relating to intervention of right. The decree was intended for the protection of the public and of competitors. It is to be read in the light of the illegal acts found and enjoined. Even without the reservations in the decree, only the court which passed the decree had jurisdiction to modify it and to con-

sider whether it should be modified. The jurisdiction of the court which entered the decree to modify it is, therefore, just as exclusive as if the case had been a suit in rem or quasi in rem. No court has power to modify the decree of another court.

The decree gave appellant and independents generally doing business under the dealer system and competing with National, rights additional to such as are accorded them under the Sherman and Clayton Acts: it provided, for example, a proposed acquisition must supplement the plant, must be for that purpose and dealt not only with cash registers but any other registering device. Thus it was more stringent than the requirements of the anti-trust laws. It would not necessarily be a violation of the anti-trust laws to acquire property which would not supplement the plant of the acquirer. The decree, however, prohibits such acquisition.

Appellant could not assert its rights in any other court. As before stated, it could not ask, with success, any other court to interfere with the discretion of the court which entered the decree to modify it. It could not sue under the Clayton Act in any other court, because that Act only gives a remedy against threatened violations. Here the violations had been enjoined. As the Clayton Act does give a remedy to prevent injury, inferentially it, as "a statute of the United States confers an unconditional right to intervention" within the meaning of Rule 24(a)(1). Should the court modify the decree and permit acquisition, appellant's rights to protection would then be lost, if it were assumed these could have been asked of some other court. The contract for acquisition was signed subject to the court's approval. This being given would thus constitute a completed transaction. The Clayton Act (Sec. 16) does not relieve against completed transactions but only against threatened injury from actions to be taken. *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916).

Moreover, as a practical proposition, any other court than that in which the decree was passed would, if the hurdle of interfering with the decree of another court were surmounted, deny relief on some theory such as that the suitor was precluded by representation of the United States through the decree in the principal case, *Wyoming* v. *Colorado*, 286 U. S. 494, 508-9, or on principles of comity or *stare decisis*, or by exercising its discretion not to award equitable relief. To permit intervention under Rule 24(a)(2), it is not necessary to show conclusively that the representation of applicant's interest by existing parties is inadequate and the applicant is bound by a judgment in the action: a showing that the representation "may be inadequate" and that applicant "may be bound" by the judgment suffices.

Invoking Rule 24(a)(2) is not intended as a reflection on Government counsel. They, themselves, it would seem, recognized that the representation of the applicant's interest by existing parties might be inadequate, since they not only made no objection to intervention but argued in favor of permitting it. Not all points mentioned in appellant's opening statement and which would have been presented had intervention been allowed, were noticed or developed at the hearing.

Also, as the decree of 1916 followed extensive and serious violations of law and was entered at the instance of the United States, a modification of the decree to permit acquisition and lessen competition should have been permitted, if at all, only after the fullest presentation of the facts to the court and not in the shape of informal communications presented to the court for its "inspection," especially after the court expressed disapproval of the letters as evidence. A witness in Cincinnati might have been produced without undue inconvenience and as to the others, if it was not desired to produce such as were not

too far distant, the depositions of all Allen-Wales dealers might have been taken by the Government upon oral examination or upon written interrogatories.

The United States was certainly in an adversary position when it prosecuted National criminally and enjoined it. Why this adversary position should disappear on a petition for modification and the Department in effect be transformed into a commissioner (R. 64) is not apparent. It is a question whether the Government, after having assumed such non-adversary position, would not have lost its right of appeal from any decree which might be entered.

Rule 24 is to be liberally construed. In the problems of anti-trust enforcement, judges should be "willing to hear from more than the conventional parties in an adversary procedure" and should "accept economic testimony appropriate for laying down a broad rule of industrial government . . ." and ". . . frame decrees suited to the character of the many dimensions of the problem revealed." *Crosby Steam Gauge, etc., Co.* v. *Manning et al., Inc.*, 51 F. Supp. 972, 974 (1943), Wyzanski, J.

Cases cited by opponents before adoption of the Federal Rules of Civil Procedure are distinguishable. Rule 24 amplified the right to intervention (notes of the Committee published by Government Printing Office, Document 101, p. 243), and "should be construed with great liberality." *Western States Machinery Co.* v. *S. S. Hepworth Co.*, 2 F. R. D. 145, 146. The rule dispenses with the requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Securities Commission* v. *United States Realty Co.*, 310 U. S. 434, 459 (1940).

The refusal of leave to intervene in this case is appealable to this court. First, it is a final judgment in an anti-trust case. It is final because appellant cannot assert its rights to prevent modification of the decree allowing ac-

quisition in any other court than that in which intervention was sought. Second, the refusal of intervention was not discretionary, since under Rule 24(a)(1), "a statute of the United States confers an unconditional right to intervene" under the circumstances of this case and the conditions for intervention of right under 24(a)(2) and (3) also exist. Third, if, contrary to the foregoing, allowance of intervention was discretionary, appeal lies from an unreasonable exercise of discretion.

The suggestion that the case has become moot because the decree was not superseded is untenable. The jurisdiction of this court is not so easily ousted. It exists whether an appeal is taken without supersedeas or with supersedeas (if it be assumed an appellant denied the right to intervention may supersede the decree to which he is not permitted to become a party). Appellant excepted to the order of November 16, 1943, refusing it leave to intervene. It filed its petition for appeal, assignment of errors and jurisdictional statement and served copies on National and the Government counsel, and requested the court to fix the bond for appeal on December 4, 1943. The court postponed the matter of allowance of appeal to December 6 and again on December 6 to December 10. The decree of December 7, allowing acquisition, was thus entered at a time when all steps which appellant could take for appeal had been taken and made a matter of record. The filing of the appeal papers constitutes a *lis pendens*. The appeal was perfected at the same term as soon as might be. When the decree of December 7 was entered, National and Allen-Wales and its stockholders had a right to proceed, but they did so at the risk that the appeal from the order refusing appellant leave to intervene would be sustained. If a case becomes moot in the absence of supersedeas, then it would follow that this court does not have jurisdiction (and, of course, it does have) to review cases appealed without supersedeas.

ARGUMENT

I. Appellant Was Entitled to Intervention of Right Under Rule 24(a)(1), (2) or (3)

As to 24(a)(1), Section 16 of the Clayton Act, properly interpreted, confers an unconditional right to intervene in opposition to attempted modification of a consent anti-trust injunction. The statute confers a right to injunctive relief in a United States Court against threatened loss or damage by a violation of the anti-trust laws. It does not in terms allow intervention in the cause where an injunction granted is sought to be vacated, in part, so as to cause damage to proposed intervenor. But if there is threatened loss or damage, and the court which passed the decree is the only one having jurisdiction of the proceeding for modification, then the rights conferred by the Act must be asserted in that court. As said in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation et al.*, 64 S. Ct. 120, 123 (1943):

> Courts will construe details of an act in conformity with dominating general purpose, will read text in the light of context and will interpret text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

As to 24(a)(2), the representation of the applicant's interest by the Government may have been considered by the Government itself inadequate in view of the Government's request that applicant be permitted to intervene to show its special economic interest and that of the class of dealers to which it belonged in opposition to the vacation of the injunction prohibiting acquisition. Besides, appellant tendered a showing of factors which were not presented or urged upon the court and of which the court should have had the benefit before deciding to permit ac-

quisition, or on the protective sufficiency of the conditions in the decree. The court should have been more fully apprised of the rapid growth and real competitive nature of the so-called cash drawer, for instance, and that the acquisition of Allen-Wales removed the largest of the independent competitors. Previous wrongdoing not to be ignored when size has been utilized in the past, and opportunity for abuse, and warnings against modification in *United States* v. *Swift et al.*, 286 U. S. 106, 116, 117 bot.-18, and the rule prescribed in that case that nothing less than a clear showing of grievous wrong should lead to change from what was decreed after years of litigation with the consent of all concerned (p. 119), were not sufficiently urged upon the court. (The wholesale grocers were allowed to intervene in that case.) See, also, *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562.

The Government's case was informally presented by letters for "inspection" instead of valid evidence and the Government assumed a non-adversary position. So the representation of petitioner's interest may have been inadequate.

Likewise, when the court modified the decree over which it had retained jurisdiction, no other court would give relief to appellant here and it would be bound by the judgment in the action. This result would be reached by one of a number of possible theories and reasons for denying relief. A court might say that the case was *res adjudicata* because the rights of the applicant were concluded by the applicant having been represented, adequately or inadequately, by the United States. The underlying reason for denying relief in an independent action would be the rule of comity which would preclude one court from attempting to interfere with a judgment of another modifying its decree under express terms of a reservation permitting modification. In *United States* v. *Lane Lifeboat Co., Inc.*,

et al., 25 F. Supp. 410, 411, a suit by the United States against the Boat Company and its surety for damages because of patent infringement liability paid, the intervenor had indemnified the surety company. The court said that Rule 24 should be liberally interpreted and, although the judgment would not directly bind the petitioner, it would, in the last analysis, do so, indirectly. In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 8 F. (2d) 1011 (Ct. App. D. C.), the court held that when one court has acquired jurisdiction of the subject matter of a case, no court of coordinate authority is at liberty to interfere with its action and said, pp. 1011-12:

> "It is manifest that there are pending in a court of competent jurisdiction two suits involving the contracts upon which the claims submitted to the Comptroller General are based. If, as suggested by appellant, that court should be of opinion that the assignment to the United States was subject to all existing equities, and that the claim here involved is not in law a claim against the United States, notwithstanding the assignment, then there would be no necessity for the writ. But, whatever may be the decision of that court, it having acquired jurisdiction of the subject-matter of this case, no court of coordinate authority is at liberty to interfere with its action. This principle is so familiar as to require no citation of authorities."

Certiorari was granted, 270 U. S. 637, and the case was affirmed on other grounds, 275 U. S. 1.

As to 24(a)(3), while the stock of competing companies is not physically in the custody of the court, it is, by the reservations of the decree so far as relates to acquisition by National, constructively in the custody of the court and the applicant is so situated as to be adversely affected by the permitted disposition of such property. In *Wabash R. R.* v. *Adelbert College of the Western Reserve University*, 208 U. S. 609, on petition for rehearing and motion to

modify the judgment, leave was asked to permit the judgment of the Ohio court to stand to the extent that it would not involve interference with the constructive possession of the federal court. The request was denied. It is recognized that the rule of that case refers to exclusive jurisdiction resulting from seizure or beginning of an action looking to seizure of property. But, by liberal interpretation, there will be a disposition of property in the custody of the court when, after a court, at the instance of the public authorities, has enjoined acquisition of such property with express reservation of right to modify the decree, the court entertains an application of the party enjoined to modify its decree, and permit the disposition of such property.

II. If Appellant Was Not Entitled to Intervention of Right Under 24(a), It Should Have Been Permitted to Intervene Under 24(b)(1) or (2). An Appeal Lies Where, as Here, There Was an Unreasonable Refusal of Permission to Intervene

As to (b)(1), if Section 16 of the Clayton Act does not confer an absolute right of intervention in a case such as this, the condition of inability to assert rights under that statute in any other court confers a conditional right to intervene.

As to (b)(2), the applicant's defense and the main action have questions of law or fact in common.

The exercise of discretion by the court is reviewable by appeal in this, as in other cases, where the discretion of the court has been held to be reviewable. Thus, in *N. L. R. B.* v. *I. & M. Electric Co.*, 318 U. S. 9, 16, 30, it was decided that under Sec. 10(e) of the Act, an application to adduce additional evidence is addressed to the sound judicial discretion of the court and the question was said to be, did the court act arbitrarily or abuse its discretion. It was found the order was not arbitrary or unreasonable or an

abuse of discretion, but the right of review was not questioned. See, also, *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

In *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, decided in 1923, before the Rules of Civil Procedure were adopted, at p. 317, the court, after reviewing previous decisions, said:

> "These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

See, also, to the same effect, *State of Washington* v. *U. S. et al., Columbia R. Packers Ass'n. et al.* v. *Same*, 87 Fed. (2d) 421, 433, 434, 435, C. C. A. 9 (1936).

In *In re Engelhard & Sons Co.*, 231 U. S. 646, cited by opponent, intervention of a customer of the telephone company was allowed to permit petitioner to assert its own claim (p. 649) and with the right to renew its application when making it appear it had authority from other specifically named claimants to represent them. Cf. *Louisville Tr. Co.* v. *Louisville, Etc., Ry. Co.*, 174 U. S. 674, 685, 686.

The reason why a refusal of leave to intervene is usually regarded as discretionary and not final is because, in the ordinary case, denial of the application does not prejudice the applicant, who can assert his rights in another court. This is stated in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315. But it is also stated (p. 315) that it is doubtless true cases may arise where the denial would be a practical denial of relief which can only be obtained by intervention, as in the instance where there is a fund in court and the refusal is not discretionary there. As we have shown, while there is not here a fund in court, there is exclusive jurisdiction regarding an acquisition of stock in the court where intervention was sought.

III. The Suggestion, Now Made in Opposition, That the Motion to Intervene Was Not Timely Is Not Supported by the Record, and, Moreover, Is Not Available to National

As previously stated, if this objection had been made, the timeliness of the motion to intervene would have been shown. Without going into the matter unduly at this time, it may be stated that the answer of the United States was not filed until Thursday, November 11 (Armistice Day), and the hearing was Monday morning, November 15. The petition to modify stated that the contract would be exhibited to the court at the hearing. It was not available to appellant for examination before the hearing. Neither was the stipulation between the Government and National. Interventions are not allowed to impeach a decree already made. *United States* v. *California Canneries*, 279 U. S. 553, 556. Surely, for the convenience of all parties, an application for leave to intervene is suitably made when presented at the very opening of the proceedings. The Government, in subordination to which appellant sought to intervene, urged, when the application was made, that the application met all the conditions of Rule 24 and should be granted.

However, discussion of the timeliness of the application is beside the point, since no objection was made on the ground of lack of timeliness. National's objection was made solely on the ground that appellant had no standing to intervene as a party in the controversy between the United States and itself. The court, after allowing conditional intervention, later revoked the permission and refused intervention before the time previously accorded for citation of authorities and without having the benefit of authorities (Cf. *Illinois Steel Co.* v. *Ramsey et al.*, *Same* v. *Aigler et al.*, 176 Fed. 853, 863, C. C. A. 8 [1910], where somewhat similar action was disapproved) and placed its

refusal of leave to intervene on the ground of National's objection of lack of status of a competitor to intervene. The court should have made an entry giving its reason for refusing intervention, namely, supposed lack of status to intervene, but the reason for the court's refusal is, from the record, nevertheless, patent.

IV. The Case Is Not Moot

A case may be appealed with or without supersedeas. One who acts under a decree before it becomes final and the time for appeal has elapsed, does so at his own risk. He cannot oust the jurisdiction of the appellate court by so proceeding.

CONCLUSION

It is submitted that a sufficient showing has been made in opposition to the motion to dismiss or affirm for the overruling of that motion.

Respectfully submitted,

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Counsel for Appellant.

PAXTON & SEASONGOOD,
SCRIBNER & MILLER,
Of Counsel.